

# THE REGIME OF STRAITS AND NATIONAL SECURITY: AN APPRAISAL OF INTERNATIONAL LAWMAKING

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The United States military potential may be viewed in two interlocking dimensions. The first is nuclear deterrence: the maintenance of a posture designed to deter other states with nuclear military potential from nuclear adventures. The second is comprised of nuclear and more conventional capabilities, designed to communicate to the widest spectrum of adversaries a capacity and willingness to exercise coercion in different settings in order to protect vital national interests.

The importance of the oceans to the use of the military instrument is obvious: the oceans, their airspace, and submerged areas are some five-sevenths of the world arena. Both of the dimensions of military potential currently include use of the oceans, their airspace, and, in particular, their straits; both require an international normative regime which facilitates that use.<sup>1</sup> Possible future uses, particularly with regard to superjacent airspace, must also be considered in determining what constitutes a minimally acceptable normative regime. It is clear, for example, that greater use of airspace for military and commercial purposes and the routinization of shuttles with satellites may make the airspace over these five-sevenths of the globe even more critical.<sup>2</sup>

In many ways, U.S. national interests in these dimensions of the maritime regime resonate positively with the common interests of the world in a system of minimum order. An effective system of mutual deterrence between the superpowers is not only in their own interests; it is a prerequisite to general survival. In any community, common interests must

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<sup>1</sup> Regarding the impacts of norms on naval activity, see Knight, *The Law of the Sea and Naval Missions*, 103 U.S. NAVAL INSTITUTE PROCEEDINGS 34 (1977); Osgood, *U.S. Security Interests in Ocean Law*, in A. HOLLICK & R. OSGOOD, *NEW ERA OF OCEAN POLITICS* 75 (1974); Hill, *U.S. Law of the Sea Position and its Effect on the Operating Navy: A Naval Officer's View*, 3 OCEAN DEV. & INT'L L.J. 341 (1976). For a more extreme view, see O'Connell's remarks in *BRITAIN AND THE SEA* (Papers and Records of a Conference at the Royal Naval College, Greenwich, September 12-14, 1973); O'Connell, *International Law and Contemporary Naval Operations*, 44 BRIT. Y.B. INT'L L. 19 (1970).

<sup>2</sup> Some perspectives are offered in Pickett, *Airlift and Military Intervention*, in *THE LIMITS OF MILITARY INTERVENTION* 137 (Stern ed. 1977).

predominate; this has been an enduring postulate of international maritime law. "Navigation and shipping," Ambassador Pardo has said, ". . . are fields where because of the requirements of international trade and intercourse . . . the international interest . . . must prevail."<sup>3</sup> Deterrence is an uncompromisable security necessity for all members of the world community. Where national claims are inconsistent with the regime that provides effective deterrence, they must yield to the inclusive interest, for minimum order is inescapably the preeminent common interest.<sup>4</sup>

The United States system of deterrence<sup>5</sup> is based on a nuclear triad: warheads delivered by land-based ballistic missiles, by aircraft, and by ballistic missiles carried by submarines (SLBM's).<sup>6</sup> Prelaunch location,

<sup>3</sup> Statement delivered before the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond Limits of National Jurisdiction on March 23, 1971, quoted in Lapidoth, *Freedom of Navigation—Its Legal History and its Normative Basis*, 6 J. MAR. L. & COM. 259-72 (1975). Where goals are stated in functional terms, it is important to test the institutional arrangements for their realization functionally, for in conventional terms, there may appear to be inequalities. Functional goals may be fulfilled when one state exercises virtual plenary jurisdiction in waters within 12 miles of its coast, while another, whose coasts front on a strait, may enjoy considerably less jurisdiction. The test here is not formal equality but whether the goal is approximated.

<sup>4</sup> I do not minimize the substantial interests of coastal states in establishing regimes to deal effectively with the increasingly intensive and potentially noxious uses of their coastal waters. Young writes, "No underinsured, ill-equipped, ill-navigated, chartless, flag-of-convenience-registered 250,000 ton tanker can ever be 'innocent' in the English Channel or the Malacca Strait, or, should it find itself there, in the Canadian Arctic." Young, *New Laws for Old Navies: Military Implications of the Law of the Sea*, 16 SURVIVAL 262, 265 (1974). Obviously, an acceptable regime must protect those interests, but unless it is compatible with minimum order requirements, no interests will survive. In many circumstances, it should be plain that coastal interests may be enhanced by not enlarging coastal competence: see note 48 *infra*. In other circumstances, organizational and normative design may accommodate freedom of navigation and coastal interest, e.g., in absolute liability standards, insurance schemes, and punitive damages. See, e.g., the statement of John R. Stevenson before Subcommittee II of the Seabed Committee, July 28, 1972, UN Doc. A/AC.138/SC.II/SR.37, at 2 (1972), cited in Knight, *Issues before the Third UN Conference*, 34 LA. L. REV. 155, 184 (1974). For an earlier discussion, see E. Lauterpacht, *Freedom of Transit in International Law*, 44 GROTIUS SOCIETY TRANSACTIONS 313, esp. 319-20 (1958-59).

<sup>5</sup> For general background, see P. GREEN, DEADLY LOGIC: THE THEORY OF NUCLEAR DETERRENCE (1966); R. JONES, NUCLEAR DETERRENCE: A SHORT POLITICAL ANALYSIS (1968); H. KAHN, THINKING ABOUT THE UNTHINKABLE (1962); A. LEGAULT, THE DYNAMICS OF THE NUCLEAR BALANCE (1974); S. MAXWELL, RATIONALITY IN DETERRENCE (1968); P. MORGAN, DETERRENCE: A CONCEPTUAL ANALYSIS (1977); R. ROSECRANCE, STRATEGIC DETERRENCE RECONSIDERED (1975); A. GEORGE & R. SMOKE, DETERRENCE IN AMERICAN FOREIGN POLICY: THEORY AND PRACTICE (1974). For historical and comparative perspectives, see R. NAROLL, MILITARY DETERRENCE IN HISTORY: A PILOT CROSS-HISTORICAL SURVEY (1974).

<sup>6</sup> On submarine warfare, see Rathjens & Ruina, *Trident*, in THE FUTURE OF THE SEA-BASED DETERRENT 66 (Tsipis, Cahn, & Feld, eds., 1973); Hill, *Maritime Power and the Law of the Sea*, 17 SURVIVAL 70 (1975); Garwin, *Antisubmarine Warfare and National Security*, in PROGRESS IN ARMS CONTROL? READINGS FROM SCIENTIFIC AMERICAN 82-94 (Russett & Blair, eds. 1979), and see the editors' Introduction, *id.* at 30-31; R. H. Smith, ASW—*The Crucial Naval Challenge*, 98 U.S. NAVAL INSTITUTE PROCEEDINGS 126-41 (1972); Scoville, *Missile Submarines and National Security*, 226

storage, relative mobility, method of delivery, targeting accuracy, and vulnerability introduce significantly different strategic, deterrent, and political factors for each.

Land-based missiles, from fixed bases and, to a lesser degree, from aircraft, exercise an inherent attraction for preemption or first strike, whereas submarine missiles, by virtue of their mobility and comparative invisibility, do not. Many students of this area believe that for the foreseeable future antisubmarine warfare techniques pose no serious threat to U.S. submarines—assuming the subs are submerged. The differences between land basing and submarine delivering are more than marginal. A former Secretary of State contends that “by some time in the early 1980s the Soviet Union will have the capability to destroy with a reasonable degree of confidence most of our land-based ICBMs. In the same period of time we will not be able to destroy the Soviet ICBM force.”<sup>7</sup> Even if this prognosis proves wrong, other significant factors must be taken into account. For one, submarine missiles are more stable politically. Precisely because land-based missiles exercise a preemption and first-strike attraction for adversaries, democratic allies hosting them will be vulnerable to domestic political pressure for their removal. The more democratic a host becomes, the more it becomes susceptible to domestic pressure to expel the very missiles protecting the alliance; national defense planners encounter this phenomenon in domestic politics about siting land-based missiles. Even where the foreign host is undemocratic, land-based missiles may make it subject to extraordinary political pressures or blandishments by the adversary. Without addressing relative military utility, it seems clear, for these and other reasons, that submarine missiles offer a more reliable deterrent.<sup>8</sup>

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SCIENTIFIC AM. 18 (1972), reprinted in Russett & Blair eds., this note *supra*; Polmar & Paolucci, *Sea-Based “Strategic” Weapons for the 1980’s and Beyond*, 104/5 U.S. NAVAL INSTITUTE PROCEEDINGS 98 (1978); Holst, *The Navies of the Superpowers: Motives, Forces, Prospects*, in *POWER AT SEA, II: SUPERPOWERS AND NAVIES 4* (Adelphi Papers No. 123, 1976). For a more popular presentation, see Stanford, *The Deadly ‘Move to Sea,’* N.Y. Times Magazine, September 21, 1975.

<sup>7</sup> *Kissinger’s Critique*, THE ECONOMIST (London), February 3, 1979, at 17, 18. The development was anticipated almost 20 years ago by Dr. Oskar Morgenstern:

The United States can make its force invulnerable by hardening. . . . But this has the simple consequence that these sites will come under correspondingly heavier attack. Their locations in the United States . . . are perfectly known to the enemy. With modern missile technology it is easy to nullify any degree of hardening by the dispatch of more missiles with more and more powerful nuclear warheads. Hardened bases draw heavier fire, mostly ground bursts producing deadly fall-out that spreads throughout the continent. . . .

Morgenstern, *Effective and Secure Deterrence, The Oceanic System*, [1960] RCAF STAFF C.J., reprinted in Polmar & Paolucci, *supra* note 6, at 107.

<sup>8</sup> The major vulnerability of airpower is that it must get off the ground. Land-based missiles may become unacceptably vulnerable in the next decade as the USSR’s throw-weight increases. To counter this development, defense specialists seek to increase the number of launch points, which, in turn, incites public resistance in the neighborhoods where siting is projected. SLBM’s do not present these problems; moreover, they often traverse shorter distances, making them more effective and advantageous.

Terms such as "gunboat diplomacy" and "showing the flag" are rather anachronistic ways of expressing the fact that an integral part of political power at any level of social organization is the general expectation that an actor has the capacity and will to use force to conserve or extend vital interests. Stability is increased when capacity, will, and vital interest are correctly appraised by others; it is decreased when they are misperceived. This process proceeds even when troops rest in their barracks and ships bunker at home ports, for it is an ongoing assessment of possibility. As Lasswell put it:

Demands for colonies, ships, and treaty revisions are continually modified in the light of estimated changes in the relative fighting position of groups; estimates of fighting effectiveness are differentially modified by actual changes in the natural resources and technology; and identifications with this or that collective symbol are partially controlled by the supposed prospects of success of that symbol in the struggle for status.<sup>9</sup>

One of the key and often misunderstood functions of the military instrument is not *during* war, but before war, and hopefully in preventing war. The military instrument is an unwelcome and yet ubiquitous feature of politics *at all times* and its relative utility at any particular time depends on comparative quanta as well as locations.<sup>10</sup> Hence the continuing im-

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Thus, Morgenthau, with extraordinary prescience, argued:

Indeed, we must go further and place the major part of the retaliatory force outside our country . . . on the vast expanses of the world's oceans, in fact under the waters. We then combine through the use of nuclear-powered, missile-firing Polaris submarines the tremendous advantages of mobility with invisibility; and we can distribute individual units *randomly*, thereby making surprise attack on any even remotely substantial part of that force impossible. I call this the *Oceanic System of Defense*.

Morgenthau, *supra* note 7, at 107.

<sup>9</sup> H. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 40 (1935; Free Press Paperback, 1965). See also E. LUTTWAK, *THE POLITICAL USES OF SEAPOWERS* 1-38 (1974). Young, *supra* note 4, argues at 266 that "probably no naval vessel can now count on being freely allowed passage through straits in time of trouble, whatever the small print of the relevant convention might say." The comparative certainty of that statement will be affected by the normative regime that results; the latter will certainly influence the degree of freedom of passage in noncrisis periods, when the military instrument continues to be important.

<sup>10</sup> See generally, E. LUTTWAK, note 9 *supra*; McGwire, *Changing Naval Operations and Military Intervention*, in Stern ed., *supra* note 2, at 151; Feld, *Military Demonstrations: Intervention and the Flag*, *id.* at 197; J. CABLE, *GUNBOAT DIPLOMACY* (1971). In this respect, Pirtle's comments would appear to miss the point. Obviously, the depth and breadth of straits make them susceptible to blockage or mining during intense belligerency: Patterson, *Mining: A Naval Strategy*, 23 *NAVAL WAR C. REV.* 52 (1971). This vulnerability must be factored into calculations by all parties who may even discover a common interest in keeping the straits open in those periods. But a key concern of an appropriate maritime regime is to keep the straits maximally open in non- and prebelligerent situations: Pirtle, *Transit Rights and U.S. Security Interests in International Straits: The "Straits Debate" Revisited*, 5 *OCEAN DEV. & INT'L L.J.* 492 (1978). In his emphasis on power alone, Pirtle, like Young (note 9 *supra*), would appear to misunderstand the general function of law in the power arena.

portance of communicating strategic and tactical capabilities. In the contemporary arena, strategic and tactical capabilities employ submarine as well as surface and aerial elements, all of which may require relatively easy access to large parts of the oceans and, in particular, transit through straits. Indeed, the expectation of accessibility is, itself, a key component of the military effectiveness of the weapons system.<sup>11</sup>

In a deterrence system, the normative regime must fulfill these requirements for all parties and must not be run aground to serve the apparent short-term advantages of one party in the ceaseless zigs and zags of competitive technological and weapons development. Thus, the fact that the USSR may benefit from making the United States "straits-bound" with regard to submerged or surface passage in a particular part of the world or that the United States may benefit from having the USSR "straits-bound" in the interim when the range and accuracy of U.S. SLBM's do not require the proximity afforded by straits passage, does not, in terms of long-range interests, justify either in establishing a regime which diminishes the *deterrent* capacities of the other. In the logic of a deterrence system, each party must remain assured of its deterrent competence; as assurance erodes, the inclination to preempt increases.

Among other things, the effectiveness of both the SLBM component of the deterrence system and the surface and aerial components of the strategic and tactical system requires unrestricted access to large parts of the oceans. In the case of SLBM submarines, access must include the right to remain submerged in order to avoid detection, a consideration at best only partially satisfied by the increasing range and accuracy of SLBM's. As a recent Stockholm International Peace Research Institute study puts it:

Unlike torpedo or cruise missile-carrying counter-shipping submarines, the ballistic missile submarine has a strategic rather than a tactical role. Its operations are therefore not confined to the vicinity of a convoy or a task force; rather it roams submerged in the millions of cubic kilometres of ocean from where it can be within range of its strategic inland targets. It does not seek to approach but rather avoids, surface ships, since its main operational requirement is to remain undetected and thereby ensure the availability of its ballistic missiles at any instant.<sup>12</sup>

In deterrence theory, detection of the submarine is as systemically dangerous as would be an antiballistic missile system to protect cities:

The deployment of ABM (anti-ballistic missile) systems to protect urban areas was prohibited by the SALT I agreements, the reason being that such systems impede the ability of ballistic missiles to attack urban areas and hence erode the counter-value role of these missiles. Similarly, an ASW [antisubmarine warfare] system designed to attack missile-carrying submarines could threaten the sec-

<sup>11</sup> For an excellent discussion, see F. KRUGER-SPRENGEL, *THE ROLE OF NATO IN THE USE OF THE SEA AND THE SEABED* (Woodrow Wilson International Center for Scholars Ocean Ser. No. 304, 1972).

<sup>12</sup> "Antisubmarine Warfare," *WORLD ARMAMENTS AND DISARMAMENT*, SIPRI Y.B. 1974, at 303, 304.

ond-strike capability of these submarines, and would thus be as undesirable as an urban ABM system: both ABM and ASW systems undermine the credibility of deterrence as a viable strategic posture. The institutionalization of deterrence as the mutual strategic posture of the Soviet Union and the United States (and presumably also France, Britain and China) appears to proscribe any military operation that could threaten the stability of strategic weapon systems on which the credibility of deterrence is based.<sup>13</sup>

An acceptable public order of the oceans as it pertains to security should provide for wide surface and aerial access and rights of submerged passage as unconditionally as possible.<sup>14</sup>

<sup>13</sup> *Id.* at 304. These conclusions will not be accepted by American or Soviet strategists who view strategic forces as being not only deterrent, but also as war fighting; they will obviously desire to threaten the second-strike capabilities of the adversary, a sequence with which this article will not deal.

<sup>14</sup> Professor Burke has argued that "[t]here appears to be a very insubstantial basis for concluding that the security position of the powers employing nuclear or other submarines would be materially prejudiced by requiring these craft to travel on the surface through straits or other parts of the territorial sea." W. BURKE, *CONTEMPORARY LAW OF THE SEA: TRANSPORTATION, COMMUNICATION AND FLIGHT* 12 (Law of the Sea Institute Occasional Paper No. 28, Univ. of R.I., 1975). Burke implies in a footnote that the development of underwater surveillance systems makes undetected passage through straits improbable: if this is the case, there is cogency to his argument. But the works he cites to support his contention are at best ambivalent on this point and at worst directly contrary to it. After a discussion of all the surveillance systems designed to locate submarines, one of the cited works observes:

Acoustic countermeasures designed to confuse the sonar devices of an opponent seem to offer considerable opportunity for effective innovation. Torpedoes carrying recorded submarine sounds, which are now employed to test and practice the use of acoustic homing torpedoes, can be easily modified to spoof the sounds of a submarine in order to confuse even the most sophisticated passive sonar. Jamming of the large passive arrays with noise makers is relatively easy since, unlike the case of electromagnetic radiation, the relevant frequency band is rather limited and can be easily covered. Other counter-ASW measures include the reduction of the acoustic cross-section of submarines by using smaller hulls made of reinforced plastics and titanium, or using fuel cells (developed for space use) that will replace the cumbersome and relatively noisy reactor with a much quieter power crew; such power plants can give future hunter-killer submarines the speed and depth characteristics of the considerably larger and noisier nuclear-power craft.

SIPRI, *TACTICAL AND STRATEGIC ANTI-SUBMARINE WARFARE* 31 (1974).

But the piece continues, "In several countries work is going on to develop torpedo-countermeasure resistance (counter-countermeasures) and achieve sonar improvements that aim at neutralizing acoustic countermeasure efforts." Once perfected, if not sooner, such efforts will probably result in still another round of countermeasures. To the same effect Pirtle contends that the operationalization of the *Trident* system, with its increased range and accuracy, will minimize the importance of straits passage for submarines. Pirtle, *supra* note 10, at 488. Like Burke, Pirtle does not address some of the considerations raised in the cited SIPRI studies. Neither considers that the common interests in the global deterrence system may require that both the United States and the USSR enjoy plenary navigation rights through straits.

Nor should changes in technology alone be invoked to devalue straits for U.S. security. Adversaries may have or may acquire means for detecting submerged passage of U.S. vessels through straits, but that does not terminate the utility of a right of submerged passage. There are many actors who will not have that means of detection, and secrecy of passage may still have strategic value with regard to interactions with them.

In the nature of things, normative regimes indulge some and deprive others and hence are always under stress. Particular components are always undergoing long-term erosion or reinforcement. But at about the time that the sea-based deterrent became increasingly refined and began to loom as one of the major bases of national security, the international legal regime of the oceans supplied many of the user access requirements through four venerable though not equally stable principles: (1) a complex of user rights traditionally referred to as the freedom of navigation on the high seas; (2) a 3-mile territorial sea, which left most of the oceans as high seas and among other things resulted in (3) a belt of international waters in most of the critical geographical straits of the world; (4) a right of innocent passage in the territorial sea which, as we shall see, was relatively broad in terms of the user and narrow in terms of the discretion afforded to the coastal state to characterize passage as noninnocent.

It was the concatenation of these legal principles that made the sea-based components of the security system possible. The U.S. interest in the maintenance of this concatenation was expressed, with few exceptions, and sometimes *despite* the U.S. delegation, in the products of the 1958 Law of the Sea Conference.<sup>15</sup> The pertinent conventions emerging from that conference took account of those interests and, in many though not all key sectors succeeded in preserving the legal environment indispensable for the deterrence system. Ironically, these norms were prescribed when the United States was so strong that the norms themselves may not have been exigent; nuclear predominance was so great that the abiding importance of the ocean and straits dimension may have been underestimated. But as the constellation of political, military, technological, and resource factors changes and U.S. power potentials vis-à-vis other actors at least equalize, an appropriate normative system becomes more urgent.

The purpose of this article is to compare the concatenation of norms of what may be called the 1958 system<sup>16</sup> with the concatenation that is emerging in the Third United Nations Conference on the Law of the Sea (UNCLOS)<sup>17</sup> and to assess whether the newer regime as it pertains to

<sup>15</sup> See generally Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AJIL 607 (1958). See also Slonim, *The Right of Innocent Passage and the 1958 Geneva Conference on the Law of the Sea*, 5 COLUM. J. TRANSNAT'L L. 96 (1966). Oddly enough, the U.S. delegation espoused a number of positions actually contrary to its interests. For example, it supported a subjective conception of innocent passage, and when it undertook its unsuccessful démarche for a 6-mile territorial sea, it did not insist on a straits exception. One can only speculate as to whether these were blunders or the result of an appraisal of the then political dependency of key straits states.

<sup>16</sup> Convention on the Territorial Sea and the Contiguous Zone (1958), 15 UST 1606, TIAS No. 5639, 516 UNTS 205 [hereinafter referred to as "Territorial Sea Convention" without additional citation]. Convention on the High Seas (1958), 13 UST 2312, TIAS No. 5200, 420 UNTS 82 [hereinafter referred to as "High Seas Convention" without additional citation].

<sup>17</sup> Third United Nations Conference on the Law of the Sea, Revised Informal Composite Negotiating Text for the Eighth Session, UN Doc. A/CONF.62/WP.10/Rev.1 (April 28, 1979), reprinted in 18 ILM 686 (1979). Research for this article was based

straits meets the requirements, in a new context, of both an international deterrence system and a U.S. sea-based security system.<sup>18</sup> Key questions are whether the new regime provides as much mobility to submarines as does the extant regime and whether it permits surface and aerial components to be shifted as security interests require.

Given the importance of the SLBM component of the defense system, a rather rigorous examination would appear called for. Since UNCLOS will produce a complex convention, an essentially textual approach to construction, as conceived by the Vienna Convention on the Law of Treaties, would appear required because of the Vienna Convention's directives,<sup>19</sup>

on the Informal Composite Negotiating Text (ICNT) of 1977, but the provisions concerned are cited from the more recent ICNT/Rev.1, where only minor changes were made in them.

<sup>18</sup> This article does not address the related issues of the adequacy to security concerns of the regimes for the exclusive economic zone and for archipelagos; some of the problems treated here arise in those regimes as well. For example, Articles 56 to 58 transform certainties about many inclusive high seas rights into grave questions with only the most general guidelines for decision (*see, e.g.*, Article 59). Treatment of these matters must await an additional article.

<sup>19</sup> On the unfortunate predilection for textualism in international legal interpretation, *see, e.g.*, U.S. Nationals in Morocco case, [1952] ICJ REP. 196, 199, and, most recently, Aegean Sea Continental Shelf case, [1978] ICJ REP. 20 ff. The Vienna Convention's codification in Articles 31 and 32 provides:

#### Article 31

##### *General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

#### Article 32

##### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.



and ineluctable owing to the absence of a formal record of the *travaux*.<sup>20</sup> The alternative hardly recommends itself. *Travaux* should be used to supplement incomplete texts, but there is something inherently implausible, in a period immediately after a text's redaction, in using extraneous material, even if it were not ambiguous and contradictory, against the manifest purport of the text. It is even more curious to suggest that use *before* the treaty has been accepted.

Given the very special political and legal problems dealt with here, it would appear equally problematic to use certain practices, as evidence of alleged custom, to illuminate the text. The Vienna Convention seems to rule out prior practice for interpreting the text, permitting in Article

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Vienna Convention on the Law of Treaties, May 22, 1969, UN Doc. A/CONF.39/27, reprinted in 63 AJIL 875 (1969), 8 ILM 679 (1969). On the issue of "special meanings" of terms and burden of proof, see OFFICIAL RECORDS, UN CONFERENCE ON THE LAW OF TREATIES, DOCUMENTS OF THE CONFERENCE 42, UN Doc. A/CONF.39/11/Add.2 (1971). With regard to supplementary means of interpretation, note that Article 32 requires that the party seeking to adduce the supplement show that an interpretation without that material would be ambiguous, obscure, manifestly absurd, or unreasonable. That is a high threshold, indeed.

<sup>20</sup> The records of UNCLOS summarize speeches on straits passage made on the record in the 1974 Caracas and 1975 Geneva sessions. Key statements on straits passage may be found in Volume I of the *Official Records* at pp. 59, 60, 63, 68, 71-72, 74, 75-76, 79, 80-81, 84, 85, 86, 87, 91, 92, 94, 96, 98, 99, 100-01, 104, 108, 110, 111, 113, 114-15, 116, 118, 119, 124, 125, 127, 128, 129, 131, 132, 135, 136, 137, 141, 142, 144, 146, 148, 151, 152, 153, 155, 159, 160, 168, 169, 172, 178, 187. In Volume II of the *Official Records*, key statements may be found at pp. 124-42.

It would be a misnomer to refer to these pages as evidence of a "discussion"; they appear, rather, as a series of prepared and read statements, with no interaction between the speakers evident. To cite one example, at the 26th meeting of the Plenary on July 2, 1974, Mongolia, Yugoslavia, Tanzania, Mauritania, and India spoke in succession. Mongolia called for free passage through all international straits. Yugoslavia affirmed coastal jurisdiction "to effectively guarantee their security and to safeguard their legitimate interests"; "commercial navigation" for "permissible and legitimate purposes" should also be guaranteed. Tanzania then contended that the entire notion of freedom of the seas was outmoded, and Mauritania followed by calling for innocent passage through straits. The circle was closed by India which called for free passage. 1 OFFICIAL RECORDS 91-93 (1975).

Professor Burke, who has criticized commentators for construing the ICNT textually, concedes that there are no adequate legislative histories, and the records of different groups meeting in closed or secret meetings are not available. Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 WASH. L. REV. 193, 202-03 (1977). The artful interpreter may, of course, pick and choose and cut and trim speeches from the meetings, but it is really quite difficult to see how this sort of record can help to illuminate a text. Off-the-record and secret meetings, in which transcripts may have been made, might indicate the actual line of consensus (if any), but the probative value of such records against the text and against the official record is a matter of question. As yet there is no systematic study of the theory and practice of the use of *travaux* in international interpretation. Thus, both *lex lata* and the otiose but actually meager record of this draft impel the interpreter to the text. Even with adequate *travaux*, a construction *contra legem* rather than *praeter legem* is most difficult to sustain, especially during periods shortly after the text was accepted. For the special problems involved in construing statements in interest by the United States and inferring acquiescence by others, see note 63 *infra*.

31(3)(b) reference to "subsequent practice in the application of the treaty." As for prior practice, it would be as difficult to construe submerged passage through straits now less than 6 miles in width as generative of a customary right of submerged passage through straits in general as it would be to construe such passage through territorial waters as generative of a right of submerged passage there. By its nature, submerged passage is not the sort of practice that generates customary rights. The notoriety and opportunity for protest by parties thereafter subordinated—requisite components of formation of prescriptive rights—can hardly be fulfilled when the strait state does not or cannot know of the passage or lacks the means of stopping it. And even if such practices were deemed to have generated customary rights in one strait, they could not *eo ipso* be applied to all straits, nor would they be probative of features of surface or aerial passage.

Both the Vienna Convention and the special features of this problem thus impel us to textual construction.

### I. FREEDOM OF NAVIGATION

One of the freedoms of the high seas mentioned in Article 2 of the 1958 Convention on the High Seas is "the freedom of navigation,"<sup>21</sup> a term comprehensive in intention including movement, observation, inspection, maneuvers, tests, and so forth, carried out above, on, and below the surface. The design of Article 2 is noteworthy. The freedoms or protected uses of the high seas are to be exercised "with reasonable regard to the interests of other states," but cannot be subjected to state sovereignty: "no state may validly purport to subject any part of them to its sovereignty." The "freedoms" can be regulated only by the treaty or by international law: "Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law." Thus, these freedoms may be deemed to be absolute in the sense that, absent a treaty or other norm, improper use may give rise to protest or stronger action on another plane, but will not permit an aggrieved state to interfere with the allegedly abusive use on the same plane.<sup>22</sup>

While the general freedom of navigation is potentially subject to some regulations, expressed either in the convention itself or in another treaty, no regulations may be applied to warships; they are immune from other than flag jurisdiction. Article 8 states that they "have complete immunity

<sup>21</sup> See generally, M. McDUGAL & W. BURKE, *PUBLIC ORDER OF THE OCEANS* 751 *et seq.* (1962); J. COLOMBOS, *INTERNATIONAL LAW OF THE SEA* 64 (6th rev. ed. 1967); for historical background, see P. POTTER, *THE FREEDOM OF THE SEAS* (1924); for military implications, see Deddish, *The Right of Passage by Warships through International Straits*, 24 JAG J. 79 (December 1969–January 1970).

<sup>22</sup> G. GIDEL, 1 *LE DROIT INTERNATIONAL PUBLIC DE LA MER* 236 (1932); M. McDUGAL & W. BURKE, *supra* note 21, at 869 *et seq.*; The S.S. *Lotus*, [1927] PCIJ ser. A, No. 10, at 25; The *Jessie*, The *Thomas F. Bayard*, and the *Pescawha* (Great Britain v. United States), 1 Ann. Dig. 175, Reports: Neilsen's 429 (1926); and see The *Le Louis*, [1817] 2 Dodson, [1853] Eng. Adm. R. 210.

from jurisdiction of any State other than the flag State." Hence, freedom of navigation for warships may be deemed to be the most comprehensive of the protected uses of the high seas. The "high seas" are defined in Article 1 of the 1958 Convention on the High Seas as "all parts of the sea that are not included in the territorial sea or in the internal waters of a state." Given the historic uses of the ocean, "all parts" has both a vertical and horizontal extension.

Whatever the vertical definition of high seas, the term "freedom of navigation" appears only to be used with regard to the high seas. Navigation through territorial waters in the Convention on the Territorial Sea and the Contiguous Zone of 1958 is characterized in Article 14 as "innocent passage" or "navigation." The words "freedom of navigation" are not used in this connection. In Article 16(4) of the Territorial Sea Convention relating to straits all of whose waters are territorial at some point, the reference is to "innocent passage" and not "freedom of navigation": "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." The International Court of Justice used similar language in the *Corfu Channel* judgment.<sup>23</sup> Insofar as a body of water connecting two parts of the high seas or the high seas and the territorial waters of a state was less than 6 miles in breadth, no special straits regime in favor of users existed. The waters were territorial and the principle of innocent passage applied with the ambiguous proviso that passage not be suspended so long as it was innocent.

On the high seas, "freedom of navigation" includes the right of submerged movement of submarines. However, this freedom does not extend under existing treaties to the "innocent passage" rights of foreign ships through territorial waters in general or through territorial waters in straits. Article 14(6) of the Territorial Sea Convention states: "Submarines are required to navigate on the surface and to show their flag." Hence a strict interpretation, in line with the principles of construction of the Vienna Convention on the Law of Treaties,<sup>24</sup> would induce the interpreter to conclude that "freedom of navigation" has not included freedom of submerged transit through territorial waters in straits, under treaties now in force, a point of some importance insofar as ambiguities in proposed texts are to be clarified in the light of the *lex lata*. More generally, the principles of innocent passage rather than freedom of navigation govern transit by any foreign vessel through territorial waters. In this respect the key difference between freedom of navigation and innocent passage is competence. In freedom of navigation, competence about the character of the user is the flag state's; in innocent passage it is the coastal state's. As for the cavil that an international tribunal will vindicate the user, it is plain fantasy. If there is an international tribunal, how does one compel the coastal state to appear there? In the unlikely event that it should appear, how

<sup>23</sup> [1949] ICJ REP. 4, 29.

<sup>24</sup> See note 19 *supra*.

can one expect the tribunal to apply norms of such exquisite vagueness in ways favorable to the user?

As long as the major maritime powers insisted on a 3-mile territorial sea, a belt of international waters between some of the more strategically critical straits was maintained.<sup>25</sup> Merchantmen as well as warships benefited from passage rights which became increasingly more protected in international law from the late 19th century on. UNCLOS has, however, produced a new regime. Article 3 of the Informal Composite Negotiating Text (ICNT) provides: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention." The rather alarming tendency, enunciated most authoritatively by the International Court in the *Iceland Fisheries* case,<sup>26</sup> to view select provisions in international drafts as indicators of consensus and hence evidence of innovative customary law, despite their failure to win the formal support necessary for adoption in conformity with constitutive processes, virtually transforms Article 3 into custom. The prophecy becomes self-fulfilling when many states, acting on the purported authority of draft Article 3, proceed to exercise their putative right, thereby providing the evidence of state practice that confirms the consolidation of the custom.<sup>27</sup> Factors such as quantitative simplicity make provisions on the order of Article 3 more likely candidates for accelerated customization than more complex provisions which, in the dynamics of conference bargaining, may have been parts of packages or trades for support in return for inclusion of Article 3 in the draft.<sup>28</sup> Be that as it may, the continuing erosion of the U.S. commitment to a 3-mile limit means that formerly high seas belts for passage through critical straits may become territorial waters. With a 12-mile territorial sea available to coastal states on demand, as many as 116 straits that currently include a high seas belt and hence are open to passage under the "freedom of navigation" may lawfully be territorialized and henceforth, in the absence of a special and clearly prescribed regime, available to ships only under the much more limited right of innocent passage. Only some of those straits may be currently vital, but a draft long-term treaty must be weighed against long-term interests, under which straits of only

<sup>25</sup> For discussion of the waxing and then waning of the 3-mile rule, see S. SWARZ-TRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* (1972).

<sup>26</sup> *Fisheries Jurisdiction* (Judgment), [1974] ICJ REP. 3, 26.

<sup>27</sup> See, in this regard, *Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf*, Decision of 30 June 1977, HMSO Cmnd. 7438, Misc. No. 15 (1978), reprinted in 18 ILM 397 (1979); and see especially the concurring opinion of Judge Briggs at 120 (ILM at p. 457).

<sup>28</sup> "It no longer seems to be seriously doubted that a 12-mile territorial sea has been established by customary international law, or soon will be unless a trend develops toward even wider limits." Burke, *Submerged Passage*, *supra* note 20, at 194 n.6.

marginal utility now may acquire the greatest and most urgent importance. Does the doctrine of "innocent passage" in its 1958 form or in its UNCLOS transformation meet the security requirements of the United States?<sup>29</sup>

## II. RIGHT OF INNOCENT PASSAGE

Articles 14 to 17 of the 1958 Convention on the Territorial Sea and the Contiguous Zone deal with "the right of innocent passage."<sup>30</sup> The comparable provisions in the ICNT are Articles 17 to 26. Both references are to surface passage and not to overflight. In both texts, there is substantial congruence with regard to the referents of passage, but marked differences with regard to the meaning of "innocence."<sup>31</sup> Article 14(4) of the 1958 text states: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law." For our purposes, it is the first sentence of Article 14(4), dealing with the notion of innocence, which is important; the

<sup>29</sup> One of the more alarming aspects of the straits debate has been the identification of those straits that are currently indispensable as the maximum number of straits likely to be indispensable in the future. Pirtle, for example, writes that "[a]lthough all straits serve the same navigation function, straits unrelated to 'lifelines' or military objectives can be factored out of the national security equation." *Supra* note 10, at 487. This type of extrapolation represents the most primitive form of policy analysis and should be eschewed. The relative importance of different avenues of the oceans in the future will depend on technics, contexts, and needs which cannot be envisaged now. It should be clear that the prudent course is not to surrender any of these maritime highways if it can be avoided. Where they must be sacrificed, it is foolish to persuade ourselves of their triviality, since it induces us to concede them for less and less. For a persuasive statement, see Grandison & Myer, *International Straits, Global Communications and The Evolving Law of the Sea*, 8 VAND. J. TRANSNAT'L L. 393, 414-15 (1975). *But see* U.S. DEP'T OF STATE, OFFICE OF THE GEOGRAPHER, MAPS RELATING TO THE LAW OF THE SEA, No. 6, World Straits Affected by a Twelve-Mile Territorial Sea. *See also* Knight, *The 1971 United States Proposals on the Breadth of the Territorial Sea and Passage Through International Straits*, 51 ORE. L. REV. 759, 772 (1972).

<sup>30</sup> On innocent passage in general, see M. McDOUGAL & W. BURKE, *supra* note 21, at 174 *et seq.*; J. COLOMBOS, *supra* note 21, at 132-35. *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS §45; Fitzmaurice, *The Law and Procedure of the International Court of Justice: General Principles and Substantive Law*, 27 BRIT. Y.B. INT'L L. 1, 28-29 (1950); Deddish, *supra* note 21. On Soviet theories, see W. E. BUTLER, *Soviet Concepts of Innocent Passage*, 7 HARV. INT'L L.J. 113, and THE SOVIET UNION AND THE LAW OF THE SEA 51-70 (1971). *See also* Przetacznik, *Freedom of Navigation Through Territorial Sea and International Straits*, 55 REV. DROIT INT'L SCIENCES DIPLOMATIQUES & POLITIQUES 222, 299 (1977). Some useful though dated discussion of the *customary* right of innocent passage and its relevance to non-signatories of the 1958 convention may be found in Donat-Pharand, *Innocent Passage in the Arctic*, 6 CAN. Y.B. INT'L L. 3 (1968).

<sup>31</sup> There is, unfortunately, no concise term to denote a passage that is "not innocent." "Noxious" passage seems too strong in connotation, especially in the light of the criteria proposed by the ICNT. The interest in precision would appear to outweigh the interest in elegance. I will use the term "noninnocent" passage to designate passage that fails one of the tests of the 1958 convention or the ICNT.

second sentence would appear to refer to the more technical aspects of passage. Article 19(1) of the ICNT replicates the first part of the 1958 provision but then illuminates it in paragraph 2:

Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State, if in the territorial sea it engages in any of the following activities:

- (a) Any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) Any exercise or practice with weapons of any kind;
- (c) Any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
- (d) Any act of propaganda aimed at affecting the defence or security of the coastal State;
- (e) The launching, landing or taking on board of any aircraft;
- (f) The launching, landing or taking on board of any military device;
- (g) The embarking or disembarking of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary regulations of the coastal State;
- (h) Any act of wilful and serious pollution, contrary to this Convention;
- (i) Any fishing activities;
- (j) The carrying out of research or survey activities;
- (k) Any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
- (l) Any other activity not having a direct bearing on passage.

The intention may have been no more than to illuminate Article 14, but the change in language here is substantive in result. Article 14 of the 1958 convention permitted the coastal state to characterize passage as non-innocent if it was, in its view, "prejudicial to the peace, good order or security of the coastal state." This formula requires the coastal state to demonstrate that effects deriving from the projected passage will be prejudicial to the coastal state itself. The category of effects may have been too ambiguous and open-ended for the prudent international user and could have been made "more precise and less susceptible to the discretionary appreciation of the coastal state,"<sup>32</sup> but it was, at least, limited to effects on the coastal state. In contrast, the ICNT, introducing the Charter formula, both severs the link to effects on the coastal state and extends the range of effects of a projected passage that the coastal state may take account of in assessing the purported innocence of a passage. Possible effects on other states may apparently be taken into account, if they are illicit under the Charter. Article 51 of the Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary. . . ." Many scholars consider the Charter's post hoc requirement for activation of the right

<sup>32</sup> Burke, *Contemporary Law of the Sea*, *supra* note 14, at 11.

of self-defense quite obsolete and contend that the Charter must now be interpreted to permit an anticipatory self-defense. If that interpretation is accepted, the discretionary judgment given the coastal state under ICNT Article 19 is even broader than would appear on its face. Professor Burke remarks pertinently:

It is one thing to base this judgment only on the activities of particular ship [*sic*] in transit (even in light of the general context of contemporary relations between the coastal state and others) and quite another to reach conclusions derived from a much broader state of affairs such as the nature of the cargo aboard, its ports of call, destination, previous history in transit, and so forth. To permit coastal officials to take into account the latter range of factors, and to link them with prevailing political relations with or between other states, broadens coastal discretion very considerably and extends it to substantial license. Concern for the broad community interest (including the coastal interest as a flag state in other contexts) justifies establishing limits on coastal discretion by providing that the innocence, or lack thereof, of passage must be determined only by specific acts occurring during passage in the territorial sea itself.<sup>33</sup>

The ICNT formula is not limited to principles *expressed* in the Charter; it refers to principles of international law “embodied” in the Charter (“*incorporé*” in the French version, “*incorporado*” in the Spanish). Whatever “embodied” means, it would not appear to require an explicit provision. Hence, it will be for the coastal state initially, and often primarily and effectively, to determine whether a principle of international law it alleges is “embodied” in the Charter.

Consider also the second part of paragraph 2(a). If the intention of the drafters was to limit the discretion of the coastal state by adding a qualification to the permissible impacts of the transiting ship on the sovereignty, territorial integrity, or political independence of the coastal state,<sup>34</sup> then it may have failed. Syntactically, the second part of Article 19(2)(a) can be read as qualifying “threat or use of force.” Consequently, the text may authorize the coastal state to characterize as noninnocent, and hence suspendable passage, activities in violation of the principles of international law embodied in the Charter of the United Nations, which are not necessarily a threat or use of force against the sovereignty, territorial integrity, or political independence of the coastal state. The impression of the French text is even more spacious, requiring that ships and planes “s’abstiennent . . . de toute autre action en violation des principes du droit international.”

Some proponents of the draft contend that a practical restraint on the discretion of the coastal state may be derived from the words, “in the ter-

<sup>33</sup> *Id.* at 12.

<sup>34</sup> This assumption, which would predispose the interpreter to construe restrictively coastal state competences to limit innocent passage, would appear to be unwarranted if the innocent passage provisions of the ICNT are compared with those of the 1958 convention. ICNT Article 19 introduces so many new limitations on innocent passage that the counter-assumption that the test intends to increase coastal state competence would appear to be the better working hypothesis.

ritorial sea.” In other words, they argue, the discretion of the coastal state to characterize a passage as noninnocent requires that the threat of violation of international law occur while the ship is in passage. There is, in short, an alleged locational requirement. But the requirement is an ineffective limitation on coastal state discretion for two reasons. First, innocence is no longer causally related to impacts on the coastal state. Second, in the environment of modern technology, the symbolic or “flag-showing” functions of surface vessels cannot be suspended during strait transit or become operative only when the ships have assumed their stations; the symbolic function commences the moment that course changes are noted and increases in intensity as the ships continue on the new course. Consider a scenario of a war in the Middle East: As a symbol of U.S. commitment and a signal of deterrence, the President orders ships in the North Atlantic to make for the eastern Mediterranean and ships in the Pacific to make for the Arabian Sea. The moment Soviet satellites note the new course, the communication of intention has been made; it is increased in intensity as the ships remain on course and move closer to the designated theater. If a state believes that the U.S. action is an unlawful intervention, in violation of international law, will it deem that communication temporarily suspended as the ships move through straits and/or territorial waters?

In belligerent situations, a state cannot be expected to tolerate enemy activity in its coastal waters. Both the 1958 and 1977 versions recognize a self-defense exception with regard to the passage of vessels of other states in innocent passage and through straits. But the 1977 conception of innocent passage goes further, for it may authorize the coastal state to characterize proposed passage by maritime users as noninnocent if the passage is related to activities in violation of international law and the Charter, even though those activities do not threaten the coastal state to the extent of activating a right of self-defense. In this respect the 1977 version transforms the UN Charter and the general reference to international law into a type of neutrality law to be specified by the coastal state on a case-by-case basis. It is an interesting idea, to be sure, but one that has been rejected in the past. In the *S.S. Wimbledon*,<sup>35</sup> for example, Germany sought to suspend French transit rights in the Kiel Canal, not for reasons of self-defense but on grounds of neutrality. The Permanent Court of International Justice rejected the claim, essentially for conventional law reasons, and then enunciated a more general principle:

... [W]hen an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.<sup>36</sup>

<sup>35</sup> Judgment No. 1 (Merits), [1923] PCIJ ser. A, No. 1.

<sup>36</sup> *Id.* at 28.



Presumably, the dictum would apply equally to a coastal state's inclination to prohibit passage, lest it contribute otherwise to a violation of international law. The obligations of third states in such matters have probably been extended in the International Court's *Namibia* opinion.<sup>37</sup> The *Wimbleton* subordinates such obligations to rights of user in international waterways. The ICNT, in turn, may be viewed as a legislative overruling of the *Wimbleton* principle, both for straits passage and for innocent passage. Given the absence of centralized international decision in security matters such as these, the net result could be a significant extension of coastal state jurisdiction over the characterization of the innocence of a proposed passage.

It is not difficult to imagine situations in which these new doctrines may operate to the detriment of U.S.-perceived security interests. *Wimbleton*-type situations are quite likely to occur, when the U.S. function in a foreign conflict is to provide an ally with food, oil, or matériel, all of which, under doctrines of modern warfare, can be considered vital to the prosecution of the belligerency.<sup>38</sup>

Even symbolic participation may be circumscribed. In January 1979, the United States elected to send a force of jet fighters to visit Saudi Arabia. Ostensible purposes included affirming support for the Saudi Government, emphasizing U.S. concern to the Soviet Union, and communicating, by deed, messages to multiple audiences in Iran. It was, in short, a type of "showing the flag" operation, using the medium of planes rather than ships; indeed, the prospect of sending an aircraft carrier from the South China Sea, the more conventional modality of communication, had been considered and then rejected. Spain refused to allow the jets to refuel in U.S. bases in Spanish territory.<sup>39</sup> Though its action was apparently based on treaty interpretation,<sup>40</sup> it is clear that Spain could have made a not implausible argument in terms of Article 2 of the United Nations Charter with regard to use of airspace superjacent to land territory and waters. That argument can be made with much greater ease with regard to innocent passage than to freedom of navigation. The remarks of Pirtle with regard to straits apply with equal force to innocent passage: "The implications of discretionary power to determine subjectively the innocence of passage through straits and to unilaterally determine limitations on such passage are far-reaching."<sup>41</sup>

The point is not that Charter principles should not be more widely applied; they should. But an aspect of determining the utility of a norm and,

<sup>37</sup> Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1970] ICJ REP. 16, 55 *et seq.*

<sup>38</sup> On this, see Grandison & Meyer, *supra* note 29, at 419.

<sup>39</sup> Burt, *Madrid Bans Refueling for F-15's on Visit to Saudis*, N.Y. Times, Jan. 13, 1979, §1, at 3 (city ed.).

<sup>40</sup> Art. VIII (2), Agreement in Implementation of Chapter VIII of the Agreement of Friendship and Cooperation between the United States and Spain, August 6, 1970, 21 UST 2259, TIAS No. 6977.

<sup>41</sup> Pirtle, *supra* note 10, at 481.

in particular, fixing its level of generality or specificity, is the decision structure that will be applying it. Many Charter principles were designed to be applied by UN organs in accord with Charter procedures; the level of generality and accordingly the amount of discretion passed on to the applier took this into account. As a general jurisprudential matter, an open-textured normative formulation in a decision process appropriately structured to the situation may be desirable because it gives discretion to the applier; the same formula may be undesirable and invite abuse if the application is unilateral. When norms whose application threatens severe deprivations to others are to be applied unilaterally, prudence requires that these norms be framed at lower levels of generality, lest the application itself threaten public order. As Burke remarked of the alternative, "The substitution of a wholly decentralized authority, fragmented amongst over 100 coastal nations, does not represent an improvement, and could lead to serious impediments to continued efficiency in transport of commodities around the globe."<sup>42</sup>

Obviously, "innocent passage," under its most generous interpretation, is a much narrower doctrine than "freedom of navigation." Freedom of navigation is navigation on the high seas. It requires no characterization, for it self-actualizes; it is what is done. Innocent passage, however, requires the coastal state to characterize the passage as appropriately innocent. Only when it has affirmatively done so is the passage insulated from lawful suspension by the coastal state. Moreover, the 1958 convention imposes the regime of innocent passage of ships through straits whose waters are territorialized (Article 16(4)), and a submarine's would-be innocence, both under the 1958 and 1977 texts, requires it to surface and to show its flag. In short, a transposition of these parts of the 1958 regime to a context in which territorial seas may be extended to 12 miles, territorializing heretofore international waters in the straits, would not appear to meet the security requirements of the United States or the Soviet Union. Since the conception of innocent passage in the ICNT is even more laden with conditions whose fulfillment must be judged by the coastal state, the emerging trend in this area of the law must be viewed, from a national security perspective, as increasingly melancholy.

### III. STRAITS

The ICNT establishes two categories of straits. The first, set out in Article 37 and illuminated and qualified in Article 38, includes straits "used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone." For these straits, the neologistic "right of transit passage" avails; we will consider it in detail below. The second category, set out in Article 45, includes two types of straits: those straits linking high seas or exclusive economic zones with waters subject to national jurisdic-

<sup>42</sup> Burke, *Contemporary Law of the Sea*, *supra* note 14, at 38. But compare his curious reversal in *Submerged Passage*, note 20 *supra*, at 209-10.

tion and those straits not included in ICNT Article 38. For Article 45 straits, only the more restricted right of innocent passage avails.

Article 38 straits and Article 45 straits are not mutually exclusive categories. There is, if one may be permitted to use the metaphor, an undertow running toward Article 45, for two reasons: the structure of Article 38 and the impact of Article 3 of the LOS draft.

Like its predecessor in the 1958 convention, Article 38's definition mixes geographical and use factors. In order for a part of the maritime environment to be characterized as a strait under Article 38 and hence entitled to the somewhat more extended rights of passage than those afforded by innocent passage, it must fulfill two cumulative requirements. It must be a bridge between high seas and/or exclusive economic zones and it must in fact be "used for international navigation." ICNT Article 36 further subjects the geographical component to a special requirement when the strait is formed by an island of the strait state; then there must be no "high seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics." Though the category is limited, this is a qualification whose potential for future constriction is great. It does not permit would-be users to invoke political convenience or necessity as a justification for using such a strait, despite the fact that a high seas or exclusive economic zone route manifests similar navigational and hydrographical characteristics.

From its inception, the use criterion has been unclear. Can the use requirement be fulfilled by the potential utility of a strait for international navigation without regard to the intensity of use, as the International Court suggested in the *Corfu Channel* case,<sup>43</sup> or is some level of use actually required to fulfill this condition? The words "used for" in both the 1958 and 1977 versions would suggest a legislative overruling of the *Corfu* judgment. If that is the case, then future decision may establish some threshold of use higher than episodic transit in order for straits to retain their Article 37 character. The result may well be that many "international straits" will be transformed into the second category envisaged under Article 45(1), and users thereafter will not fall under transit passage but will be required to fulfill the even more stringent requirements of "innocent passage." This aspect of the formulation of the ICNT must be viewed as unfortunate from the standpoint of world order, for it is the sort of ambiguity that is likely to excite mischief.<sup>44</sup>

<sup>43</sup> [1949] ICJ REP. 4.

<sup>44</sup> Geography outweighs use in this formula. Ironically, a tribunal could not compute the quantum of use of a strait which might have been intended to fulfill the use requirement so that it could internationalize the strait. Compare *The Case of the Edisto and Eastwind*, 57 DEP'T STATE BULL. 362 (1967); Pharand, *Soviet Union Warns United States Against Use of Northeast Passage*, 62 AJIL 927 (1968). The controversy, by no means settled, of the "innocence" of warships for passage purposes, will thus be transferred to many straits situations. See, in this regard, Przetacznik, *supra* note 30, at 302-15.

Article 45 will absorb other straits because of the flow of territorial waters seaward. Prior to the UNCLOS policy allowing extension of territorial waters to 12 miles' breadth, any body of water beyond a strait which body was more than 6 miles wide contained, perforce, a water and air column whose breadth was equivalent to the surplus over those 6 miles, and that water and air column was legally international, rendering the strait "international" in the sense in which Article 38 of the ICNT uses the term. Subsequent to ICNT Article 3, however, the body of water in the strait must be more than 24 miles wide in order to allow for a column of "international waters." The result is that more of the geographical straits of the world become legal straits for which passage must qualify under Article 38 and Article 45. A side benefit, however, is that now even straits less than 6 miles in width may qualify, *ceteris paribus*, for transit passage.

I do not propose to inquire whether straits currently falling in the Article 45 category are deemed vital for U.S. security. UNCLOS is creating a long-term treaty and in the course of its life, conceptions of security and security needs may be expected to change many times.<sup>45</sup> I take it as given that, over the long haul, some and perhaps many of the straits in this category will become vital. The regime the ICNT provides for straits in the categories established by Article 45 would appear to be insufficient for the security needs of the United States. The passage must be prospectively "innocent," as determined by the coastal state; even if it fulfills the many conditions of innocence, submarines will still be required to effect their passage on the surface. Hence, even if the ICNT regime for straits governed by Article 38 were satisfactory from a security standpoint, the number of international straits falling under Article 45 as well as the "undertow" toward that provision would still stir substantial doubt about the acceptability of the ICNT in this regard.

#### IV. TRANSIT PASSAGE

The ICNT's regime for straits governed by Article 38 poses its own disturbing questions. Article 38 of the ICNT provides:

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded, except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if a high seas route or a route in an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exists seaward of the island.

2. Transit passage is the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through

<sup>45</sup> See, in this regard, the pertinent remarks of Knight, *supra* note 29, at 772.

the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

3. Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention.

Earlier drafts submitted by the United States and the Soviet Union may provide a foil. In 1971, the United States proposed the following provision for straits:

In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.<sup>46</sup>

An early Soviet draft provided that "[n]o State shall be entitled to interrupt or suspend the transit of ships through straits, or engage therein in any acts which interfere with the transit of ships, or require ships in transit to stop or communicate information of any kind."<sup>47</sup> There are some striking additions, deletions, and arrangements in the ICNT product, in particular, the introduction of the concept of "transit passage."

"Transit passage" is a neologism; it lies somewhere between "freedom of navigation" on the one hand, and "innocent passage" on the other. It is a compromise, a concession or a second-best solution<sup>48</sup> when contrasted

<sup>46</sup> 65 DEP'T STATE BULL. 266 (1971). Thus, John Stevenson in a statement to Subcommittee II of the Seabed Committee, July 28, 1972: "The United States and others have also made it clear that their vital interests require that agreement on twelve mile territorial sea be coupled with agreement on free transit of straits used for international navigation and these remain basic elements of our national policy which we will not sacrifice." *Supra* note 4.

For an early review, see Ratiner, *United States Ocean Policy: An Analysis*, 2 J. MAR. L. & COM. 225, 263-64 (1971); Knight, *supra* note 29, at 773. See also Cundick, *International Straits: The Right of Access*, 5 GA. J. INT'L & COMP. L. 107 (1975). Five years after the 1971 proposal, an official explained U.S. objectives as follows: "... what we seek is freedom of navigation (i.e., submerged transit) and overflight for the purpose of transit in straits connecting high seas to high seas. We oppose the restrictions of innocent passage in such straits. . . ." Letter of Stuart French, U.S. Department of Defense, to Senator John C. Stennis (Aug. 11, 1976), quoted in Burke, *Submerged Passage*, *supra* note 20, at 218-19.

<sup>47</sup> UN Doc. A/CONF.62/C.2/L.10 (1973), at 189-90, Art. 2(e).

<sup>48</sup> Much has been made of the coastal state's interest in having submarines pass on the surface through straits. While concern for navigation and for rules of the road may be valid, there would appear to be no increment of coastal security in having submarines surface when proximate to the coastal state. Indeed, these arguments seem to be based on a misperception of the distinctive nature of the submarine's function and a confusion of the submarine with surface vessels. Even if the transiting submarine were targeting sites within the coastal state, it would not have to

with the earlier maritime power drafts. The key question is whether, on its face or as construed by international law's methods of interpretation, the new doctrine of transit passage gives rights, in a quantity and with certainty sufficient to make the regime acceptable from a security standpoint. Some commentators are convinced that it does. Pirtle, for example, writes that "[t]he ICNT provisions on transit passage and archipelagic sea-lanes passage constitute a treaty weighted in favor of the navigation and security interests of the United States."<sup>49</sup> U.S. negotiators apparently agree and believe that transit passage is very, very close to the freedom of navigation available on the high seas and, moreover, that the text provides a right of submerged passage by submarines which would unquestionably be deemed to be an exercise of the freedom of navigation.<sup>50</sup> In support of this interpretation one may note that the ICNT's definition of "transit passage" does, indeed, include a reference to the "freedom of navigation" and does not include a requirement of surface passage by submarines. Furthermore, insertion of "transit passage" seems to exclude "innocent passage." But the text is not explicit and an interpretation based ultimately on an intersection of *inclusio* and *exclusio* is not the sort of case a lawyer happily sends to trial.

The more optimistic interpretation of Article 38 encounters a number of obstacles. When a legal document speaks of duties, it may be presumed to mean legal duties and not moral or ethical duties whose content or compliance depends only upon the duty-bound party. The correlative of a duty is a right. Though Article 39 speaks of user duties, it necessarily imports coastal rights. It must be construed as allowing the coastal states a broad prescriptive and applicative competence with regard to transit passage unless we are to assume that the "duties" are no more than moral imprecations. There is no correlative here to Article 236, the sovereign immunity clause, with regard to coastal regulations under Article 42. Of most concern are some of the duties imposed on users by the relevant terms of Article 39(1):

1. Ships and aircraft, while exercising the right of transit passage shall:

- (a) Proceed without delay through or over the strait;
- (b) Refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering

approach the state, since the range of its missiles would permit it to stand off beyond territorial or straits waters. As for showing the flag, that traditional naval function can only be accomplished when the sub has surfaced. The likelihood that the submarine will become a target for nuclear or conventional attack and set off, theoretically, secondary nuclear explosions or radiation contamination increases with increased visibility to adversaries. From a security standpoint, the coastal state's safety increases *the less* others know of the transiting submarine's whereabouts. It is thus more likely that the coastal state's demand for surface transit is based either on misunderstanding of the situation or the desire to increase its competence in order to augment power vis-à-vis the transiting state.

<sup>49</sup> Pirtle, *supra* note 10, at 486.

<sup>50</sup> Letter from Senator Barry Goldwater to the author, July 23, 1976.

straits, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(c) Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;

(d) Comply with other relevant provisions of this Part.

In order for passage to be "transit passage," it must be effected without delay, not be a "threat or use of force against the sovereignty, territorial integrity or political independence of States bordering straits" (note the plural usage here), and not "in any other manner in violation of the principles of international law embodied in the Charter of the United Nations." Because these are legal duties and hence require characteristics that the coastal state must assess, "transit passage" takes on many of the features of innocent passage. In comparison, high seas "freedom of navigation" has virtually no limitations or qualifications other than the duty of reasonableness which attends virtually every right. And insofar as international norms do apply, the danger of provocative unilateral application is minimized by other norms and by the spatial context.

Since the major differences between innocent passage and freedom of navigation are the conditions and right of qualification of the coastal state with regard to the former, "transit passage" seems more a species of innocent passage than a high seas freedom. Though ICNT Article 44 does conclude that "[t]here shall be no suspension of transit passage," that is not the same as saying "[t]here shall be no suspension of passage." In other words, a state bordering a strait might unilaterally determine that a particular transit, in given circumstances, violates ICNT Article 39(1)(b), hence is not a "transit passage" in the meaning of the convention and may either be prohibited *entirely* or permitted only upon the fulfillment of conditions imposed by the coastal state, for example, upon surfacing.

Moreover, transit passage, as defined in ICNT Articles 37 to 39, requires characteristics that are incompatible with the high seas notion of freedom of navigation. In particular, the word "solely" in Article 38(2), the broad right of characterization necessarily given to the coastal state in Article 39(1)(b), and the ambiguous scope of Article 39(1)(d) add conditions that never burdened "freedom of navigation." Though not without ambiguity, Article 41(1) may constitute possible authorization to the strait state to insist on surface transit of submarines through busy straits as a safety regulation, particularly when contrasted with Articles 42 and 236. The equivocality of these provisions would excite no concern were there an explicit provision stating that submarines may always traverse international straits submerged.

The net result of the ICNT in this regard is that the extension of territorial waters from a 3-mile limit territorializes formerly high seas belts in strategically critical international straits; in return, the ICNT does not unequivocally guarantee a functional equivalent to the virtually unconditional "freedom of navigation" that other maritime states used to enjoy in the belt of international waters through international straits. Instead,

it offers a right of "transit passage," burdened with qualifications unknown to the "freedom of navigation." The situation could begin to approach Jared Carter's nightmare of "ten, fifteen, twenty Berlin corridors."<sup>51</sup>

#### V. THE PROBLEM OF SUBMERGED PASSAGE

Even if "transit passage" affords users significantly more rights than does innocent passage as far as surface passage is concerned, a key question for U.S. security is whether "transit rights" permit submarines, while submerged, to traverse straits. Innocent passage does not accord submarines this right; hence, submarines traversing straits under Article 45 of the ICNT must surface in order for their passage to be deemed innocent.

The section dealing with transit rights does not explicitly require submarines to surface, as does ICNT Article 20 and Article 14(6) of the 1958 convention. It is possible to infer a permission from the absence of a prohibition, a possibility whose reasonableness is enhanced by the fact that the parallel innocent passage provisions do contain an express prohibition. It is, alas, equally possible not to infer a permission which is not explicit, especially when international jurisprudence interprets derogations from sovereignty strictly and textually. U.S. negotiators have apparently told members of the Senate that Article 39(1)(c) of the ICNT does accord submarines the right of submerged passage and, perhaps because of some disquiet about the ambiguity of the text, refer to an "understanding" on this point.<sup>52</sup> In my view, neither textual interpretation nor private understanding succeeds in removing clouds from title.

Do the words, "normal modes of continuous and expeditious transit," in Article 39(1)(c) amount to a nonsuspendable license to traverse straits submerged? In order to reach this result, "normal mode" must be construed as noncontextual, nonnormative, and permanently vessel-specific. But in the text and in general, this interpretation is forced and unreal. Mode of transit of different vessels is, in part, a factual question, but it also has normative and contextual components, for what is "normal" will depend on context, including the legal environment. It is neither implausible nor inconsistent with other ICNT provisions to assume that both the coastal and the flag state will participate in determining "normality" for vessels transiting coastal waters.

As for the vessels themselves, a layman is not equipped to characterize the normal mode of transit of submarines but would assume that mode would vary according to such factors as type of channel, density of traffic, safety factors, nature of mission, rules of the road, and so on. What may be "normal" in internal or territorial waters would be "abnormal" on the high seas, and so on. Knauss, for example, writes that ballistic missile submarines now run submerged through their entire patrol, including

<sup>51</sup> Carter, *The Outlook for the Territorial Sea and Navigation through Straits and on the High Seas*, in MARINE TECHNOLOGY SOCIETY, LAW OF THE SEA REPORTS 135, 136 (1972).

<sup>52</sup> *Ibid.*



international straits, but notes that "it would certainly be easier and safer to go through those narrow and busy straits on the surface."<sup>53</sup> It is quite likely that a modern submarine moves efficiently and safely submerged, but one could not infer from this datum (which might itself be controverted in some contexts) that submerged passage was "normal" for all circumstances.<sup>54</sup> Nor would Article 39(1)(c) appear to override the state's regulatory competence for matters such as navigation and safety.<sup>55</sup> In other words, the user would be hard pressed to justify evading such regulations on grounds that they required departure from its normal mode of transit.

From a textual standpoint, the "normal modes" aspect of ICNT Article 39(1)(c) raises problems not easily resolved, especially in view of the textual orientation of international treaty construction. The "freedom of navigation" for passage through straits established in Article 38(2) is not freedom of navigation in the high seas sense: it is "freedom of navigation and overflight solely for the purpose of continuous and expeditious transit." That qualification was apparently introduced in order to deny ships transiting straits all the other components of freedom of navigation, such as overt military exercises and weapons testing, surveillance and intelligence gathering, and refueling. The purport of the provision is negative, *i.e.*, vessels should refrain from activities other than those incident to transit. The "normal modes" qualification appears in the following context: "Ships and aircraft while exercising the right of transit passage, shall . . . (c) [r]efrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress. . . ." The plain and natural meaning of that provision would appear to emphasize the notion of expeditious transit. As two U.S. negotiators commented in 1975, "The 'security' problem with submarine and military aircraft transit of straits is in fact one of limiting the right to transit to its normal incidents."<sup>56</sup> In other words, you may do

<sup>53</sup> Knauss, *The Military Role in the Oceans and Its Relations to the Law of the Sea* in *LAW OF THE SEA: A NEW GENEVA CONFERENCE 77* (L. Alexander ed. 1972). But compare Goldblat, *Law of the Sea and the Security of Coastal States* in *LAW OF THE SEA: CARACAS AND BEYOND 301* (Christy et al. eds. 1975).

<sup>54</sup> Thus Professor Burke, writing in 1975, observed:

Another contention is that safety requires submerged transit. It seems rather late in the date to urge this seriously in view of the previously wide acceptance of a requirement for surface transit in the territorial sea, including acceptance by the major powers operating nuclear submarines. There may be substance to this point, but concern for safety can be satisfied in other ways more consonant with coastal interests than simply providing for unannounced submerged passage by large nuclear-powered vessels carrying nuclear weapons.

*Contemporary Law of the Sea*, *supra* note 14, at 12.

<sup>55</sup> Burke argues on the basis of textual analysis that "Article 38 does not authorize the coastal state to determine what is a 'normal' mode of transit each time a vehicle approaches a strait." *Submerged Passage*, *supra* note 20, at 214. That may be so, but the ICNT would appear to permit the coastal state to determine or participate in determining "normal mode" for classes of vessels and/or for specific time periods, *e.g.*, periods of crisis.

<sup>56</sup> Stevenson & Oxman, *The Third United Nations Conference on The Law of the Sea*, 69 AJIL 1, 15 (1975).

things normally associated with modes of continuous and expeditious transit, even though such activities would otherwise be forbidden in transit passage. Sonar, for example, may yield information of intelligence value, and one of the ancillary functions of the use of sonar on the high seas may be the intelligence dividend.<sup>57</sup> Even though you may not gather intelligence in transit passage, you need not suspend sonar when you transit straits if you ordinarily use sonar in your continuous and expeditious transit. Thus, the simplest or most natural interpretation of Article 39(1)(c) is one that does not focus on normal mode, whatever that may be, but rather on the activities ancillary to transit, which, absent this provision, would be prohibited by Article 38.

Alternative interpretations of Article 39 encounter other problems. There are, for example, internal contradictions if Article 39(1)(c) is read to permit submerged transit of straits. The subsection immediately preceding subparagraph (c) recognizes the coastal state's competence to appraise the contemplated passage, *inter alia*, for its conformity to the principles of international law embodied in the UN Charter. If submerged passage is secret passage, then how can the coastal state perform that function under subsection (b)? How can it control unauthorized research and survey activities which may be undertaken by the submerged vessel under Article 40? How can it implement its safety and sea lanes regulations (Articles 41 and 42), and so on?<sup>58</sup> If anything, the structure of the entire section dealing with transit passage emerges as a more coherent drafting complex if no right of submerged passage is hypothesized.

The provisions regarding innocent passage, including the requirement that submarines traverse territorial waters on the surface, appear in part II of the ICNT, while the issue of transit passage occurs in part III. Could an authoritative interpreter infer from this an implied bar of the rules of innocent passage to all of part III? Such a construction seems forced and, for such a grave matter, unsatisfactory. It is far more reasonable to assume that provisions will be interpreted by reference to the entire instrument, a point confirmed by the Vienna Convention<sup>59</sup> and the recent *Beagle*

<sup>57</sup> One would, in this regard, take exception to Professor O'Connell's view that free transit would permit one

to go through using your sonar, with helicopters engaged in dunking sonar operations, with missiles unhoused, etc., etc., and doing a zig-zag pattern and the like, all of which one would assume you could do in the high seas but not in the territorial seas engaged in innocent passage.

BRITAIN AND THE SEA (Papers and Records of a Conference at the Royal Naval College, Greenwich, 1973), cited in Young, *supra* note 4. To the contrary, it would appear that the words "normal mode," reasonably construed, would limit many of the operations in Professor O'Connell's *reductio*. Compare Knight, *supra* note 29, at 773, especially the reference to "on-board activities."

<sup>58</sup> Despite Professor Burke's assertion (*Submerged Passage*, *supra* note 20, at 208), it is difficult to see how the qualifications of ICNT Articles 38 and 39 could be as easily fulfilled by a submarine as a surface vessel. With regard to Article 38(1)(c), for example, how can one tell if a passing submerged vessel is or is not preparing to cause injury?

<sup>59</sup> Article 31(2)(a), UN Doc. A/CONF.39/27 (1969), DOCUMENTS OF THE CONFERENCE, *supra* note 19, at 287, 293.

*Channel* arbitration.<sup>60</sup> In any case, part III does make incorporations by reference to the rules of innocent passage, for example in Article 45, and refers generally to other provisions in Article 38(3).

The presence of conditions whose fulfillment must be certified by the host state in order for passage to be innocent and hence nonsuspendable would probably lead an international tribunal, were it seized of the case, to conclude that passage is not a right at all, but a type of license. This is not the place to enter into extensive discussion of international servitudes,<sup>61</sup> but it is worth recalling the International Court's judgment in the *Right of Passage* case.<sup>62</sup> There the Court distinguished between passage not subject to conditions by the host, a virtual servitude whose suspension by the host would be delictual, and passage subject to conditions, for which suspension by the host could be lawful. It is apparent with regard to straits that nothing akin to a servitude is being created in the ICNT. Hence, anticipation of extensive construction of the rights granted would appear unwarranted.

Allegations by U.S. negotiators to members of the Senate of an "understanding" on the right of submerged passage through straits are puzzling.<sup>63</sup>

<sup>60</sup> CONTROVERSY CONCERNING THE BEAGLE CHANNEL REGION [Chile v. Argentina] (Santiago 1977).

<sup>61</sup> See generally North Atlantic Coast Fisheries Arbitration (United States v. Great Britain), Hague Ct. Rep. (Scott) 141 (Perm. Ct. Arb. 1913), PERMANENT COURT OF ARBITRATION, NORTH ATLANTIC COAST FISHERIES ARBITRATION, Vols. 1-12 (Washington: GPO, 1913); S.S. Wimbledon, [1923] PCIJ ser. A, No. 1; Rights of Passage, [1960] ICJ REP. 6; for a survey of the literature, see D. O'CONNELL, 2 INTERNATIONAL LAW 602 *et seq.* (2d ed. 1970).

<sup>62</sup> [1960] ICJ REP. 6.

<sup>63</sup> Goldwater letter, *supra* note 50. Professor Burke develops another conception of "understanding." He sifts "comments, questions and proposals" about submerged passage and finds that these confirm, in his judgment, an understanding shared by participants that submarines would have a right of submerged transit through straits. *Submerged Passage*, *supra* note 20, at 205. There are many serious problems with this approach. The first, as mentioned, is that there is no record to speak of, but only fragments; how probative such a record would be is open to grave question. The second is that many of the statements that are available can be disqualified for interest. The fact that the United States, for example, continued to insist on its understanding of an equivocal text (*see id.* at 206) neither banishes the obvious equivocality of the text nor proves that others accepted the interpretation pressed by the United States. It simply proves that the text is equivocal and that the United States, unable to secure a text that clearly expressed its interest, had no choice but to say petulantly, "Well, this is what *we* mean." Alas, the objective in this game is not to make statements, off the board, but to win the text that you need. Third, the acquiescence by others is derived essentially from the absence of evidence in the "record" that others did not object. Whatever the chairmen of individual committees may have thought, recent diplomatic history should demonstrate the peril of this course. In negotiations with the People's Republic of China over Taiwan, the United States apparently satisfied itself with an understanding based on its own statement, which was not challenged by China. At a later stage, China "clarified" its position and the U.S. "understanding" dissolved. Despite all of the alleged "understanding" he tries to reconstruct, Professor Burke is still somewhat cautious about conclusions; in a single page, he shifts from an "unmistakable" right of submerged passage, to "little room for question," and then "strongly suggests" (*id.* at 207). The ambivalence is important. The point of the

If it is a conference-wide understanding that is documented and/or incorporated by reference through a general provision, then this is a telling point. There are, of course, conventional requirements for such an understanding. There is a possibility that the Vienna Convention in Article 31 may require that such an agreement be between all the parties or be accepted by the other parties.

Unfortunately, there is no record of such an understanding and no way of establishing that all parties to the treaty share or accept this ancillary agreement. If our negotiators are referring to a suppressed document, presumably concluded with a much smaller number of states, its power to counter the plain and natural meaning of the convention would appear doubtful, to say the least. Whether an agreement that has not been registered under Article 102 of the United Nations Charter can be invoked against a multilateral treaty, which presumably will have been, is also doubtful.

"An oral agreement," Samuel Goldwyn quipped, "isn't worth the paper it's written on." The idea of an undocumented "understanding" among all or even most of *the more than 150 delegations* at the LOS conference is preposterous, and the lawyer who would believe it, advise reliance on it, or invoke it before a tribunal would be very naive indeed. If our negotiators are referring to "secret" understandings with key strait states about a U.S. right of submerged transit through their straits, then one can only remark on the peril and shortsightedness of such a course.<sup>64</sup> If the plain and natural meaning of the ICNT is against these understandings, then they are unlikely to survive changes of government in the strait states, if that long. Why there should be an understanding on something so important at a meeting whose manifest function is to articulate norms on the subject is also puzzling. The asymmetry in our willingness to accept understandings in matters vital to us but to concede explicit provisions in matters vital to others is more than disquieting.

## VI. APPRAISAL AND CONCLUSION

The straits regime of the ICNT poses two problems: the absence of an express right of submerged passage in a context of other provisions, many of which could be inconsistent with an allegedly implied right, and, second, the more general problem, common to the innocent passage regime, of the

present inquiry is not that submerged passage is excluded, but that it is not certain in the text, and, in the absence of express confirmation, is unlikely to defeat coastal competences which are explicit and could be used to require surface passage and, in some circumstances, ban passage and overflight.

<sup>64</sup> This hypothetical strategy is reminiscent of Boss Hague's apothegm that an honest politician is one who stays bought. The notion that bilateral agreements with particular states are sound strategy for matters of the sort discussed here rests on the assumption that association of a state with one alliance or another is stable. Recent experience in Iran, Ethiopia, Afghanistan, Somalia, Vietnam, and China, to mention only a few, should demonstrate to both superpowers the advantages of a system of real rather than personal rights, for uses deemed to be of inclusive security concern.

enhanced primary competence of the coastal state to characterize any passage below, on, or above the surface as violating "transit" requisites and hence not "transit passage."

The language of the Camp David agreement of 1978 dealing with straits passage may be contrasted with that of the UNCLOS text. It is particularly instructive for, though bilateral, it purports to enunciate many general norms and is the first major diplomatic statement on the subject since the ICNT draft. Moreover, the United States played a significant role in its formulation. Rather than adopting or even intimating any relation with the UNCLOS formula, the Camp David formula states in part: "[T]he Strait of Tiran and the Gulf of Aqaba are international waterways to be open to all nations for unimpeded and nonsuspendable freedom of navigation and overflight."<sup>65</sup> With this sort of formula, tortured, casuistic interpretations are not necessary. Indeed, Camp David is redundant in emphasizing precisely what the ICNT overlooks. The waterways are characterized as "international" and any hint of a territorial competence with regard to passage is repeatedly excluded; there is no "right of transit" characterizable by the coastal state, but instead and only the traditional freedom of navigation, and that right may not be impeded or suspended. Interpreted logically or teleologically, Camp David produces freedom of navigation and, were it necessary, even a right of submerged transit. The ICNT achieves nothing approaching that clarity.

Empson analyzed seven types of ambiguity in our culture,<sup>66</sup> but a wise old country lawyer was wont to remark that there are only two kinds that matter: your ambiguities and the other fellow's. It is as unwarranted to contend that UNCLOS rejects outright the types of straits passage needed for U.S. security as it is to contend that UNCLOS grants them outright. The problem is the ambiguity. It would be imprudent to ignore the erosion in the UNCLOS draft of key aspects of a maritime regime that will continue to be important to the United States and irresponsible to deny the transformation of certainties into ambiguities. In the changing world power process, these may prove to be the other fellow's ambiguities. Fortunately, there are yet opportunities, at the international and national levels, for dispelling any possible misunderstandings about the regime of straits and national security and for assuring a regime that will serve the common interests of the world community.

<sup>65</sup> U.S. DEP'T OF STATE, PUB. NO. 8954, *THE CAMP DAVID SUMMIT* (Near East and South Asian Ser. 88, 1978), cited from 17 ILM 1463, 1470 (1978).

<sup>66</sup> W. EMPSON, *SEVEN TYPES OF AMBIGUITY* (1930).